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Supreme Court, U.S.
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No. 95-96

In The

Supreme Court of the United States

October Term, 1995

PIEDMONT AVIATION, INC.,

Petitioner,

vs.

HOBART N. CROCKER, JR.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DAVID M. KIRSTEIN
Counsel of Record
ROBERT M. BECKMAN
BECKMAN & KIRSTEIN
Attorneys for Respondent
2300 N Street, N.W.
Suite 725
Washington, D.C. 20037
(202) 835-3200

7220
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTION PRESENTED

Whether a job applicant denied employment under the first right of hire provision of the Airline Deregulation Act who seeks money damages equal to the salary he would have earned less his income from alternative employment has a Seventh Amendment right to a jury trial.

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RESPONDENT'S BRIEF IN OPPOSITION

Hobart N. Crocker ("Crocker" or "Respondent") by counsel, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the D.C. Circuit's opinion in this case. That opinion is reported at 49 F.3d 735 (D.C. Cir. 1995).

Respondent accepts Petitioner's statement of the case except Respondent does not believe this case raises any broad issue on the right to a jury trial. Respondent also incorporates the description of the facts set forth by the D.C. Circuit which appears in Petitioner's Appendix at pp. 3a-4a.

REASONS FOR DENYING THE WRIT

This case does not merit review by the Court. The issue of Mr. Crocker's right to a jury trial on his claim for monetary damages arises in the context of the Airline Deregulation Act of 1978. 49 U.S.C. App. § 1552 (recodified as 49 U.S.C. § 42103(a)). The statutory right to claim a first right of hire expired in 1988. *Id.* Because the law expired seven years ago, few, if any other, first right of hire cases will be affected by the Court of Appeals' decision. No other courts of appeal have ruled on this question, so there is no conflict among circuits. Moreover, the D.C. Circuit gave a careful and narrow interpretation to *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558 (1990). *See* App. at 21a-27a. The D.C. Circuit's opinion is well reasoned and provided the careful scrutiny required by the rulings of this Court before a party can be denied a right to a jury under the Seventh Amendment.

Petitioner suggests that the D.C. Circuit's decision has broad implications for claims under a wide range of federal statutes dealing with employee rights. Pet. at 6. Petitioner, without any justification, postulates that if other circuits adopt the analysis of the D.C. Circuit there will be a substantial increase in jury trials in federal courts in employment related cases. Petitioner greatly exaggerates the potential impact of the D.C. Circuit decision. Whether a claim for lost pay is legal or equitable for Seventh Amendment purposes is dependent upon the underlying statute in question and cannot be resolved using the generalized approach posited by Petitioner.[1]

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1. Petitioner suggests that review is "particularly appropriate" because the Court has granted certiorari in another Seventh Amendment case, *American Airlines v. Lockwood*, 115 S. Ct. 2274 (1995), which requires reference to the Seventh Amendment standards of *Terry*. Pet. at 7, 21. This suggestion is without merit. Other than invoking the two step Seventh Amendment analysis,

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I.

THE CIRCUIT COURT'S DECISION IS CONSISTENT WITH THIS COURT'S HOLDING IN *TERRY.*

The D.C. Circuit Court carefully applied the analysis set forth in *Terry* and found that Crocker's claim for damages equal to the pay he would have received less any income obtained in another job was not restitutionary. App. at 22a-23a.[2] Petitioner's view of restitution under *Terry*, rejected by the Circuit Court, is obviously flawed in two respects. First, *Terry* held that plaintiffs' damage claims against the union for wages and benefits they would have received from the employer was not restitutionary. *Terry*, 494 U.S. at 570-71. However, no language in *Terry* supports petitioner's quantum leap to the proposition that therefore *any* claim for damages against a potential employer for failure to hire is restitutionary. Second, the Court's discussion of backpay under Title VII states that "Congress specifically characterized backpay under Title VII as a form of 'equitable relief.' "*Id.* at 572. Therefore, the Court concludes that backpay sought "under Title VII would generally be restitutionary in nature." *Id.* at 572 (*citing Curtis v. Loether*, 415 U.S. 189, 197 (1974)). Nothing in *Terry* even remotely suggests that the Court, outside the Title VII context prescribed by Congress, would find a

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the *Lockwood* case involving a right to a jury action for a declaration of patent invalidity has nothing whatsoever to do with the issues in *Terry* raised by Petitioner.

2. The fact that income from alternative employment would be deducted from any recovery clearly precludes a finding that Crocker's recovery would be restitutionary under common law principles. Restoration of something lost by Crocker would not be reduced by income from alternative employment. App. at 23a.

damage claim like Crocker's under the Airline Deregulation Act to fall within the historical definition of restitution.

Petitioner is equally off the mark in its expansive analysis of *Terry's* "incidental to or intertwined with injunctive relief" language. *Id.* at 571. As the Circuit Court found, the Court's reference to intertwined applied to statutory schemes like Title VII or Section 17 of the Fair Labor Standards Act under which the District Court judge is given discretion to award monetary damages as an adjunct to equitable remedies to assure complete relief. App. 23a-27a. *See Terry*, 494 U.S. at 571.

In the instant case, the damage claim is a non-discretionary legal claim. If a violation is proven, Crocker is entitled to monetary damages regardless of whether the District Court awarded instatement.[3] App. at 25a-26a. *See also, Albamarie Paper Co. v. Moody*, 422 U.S. 405, 441-43 (1975) (Rehnquist, J., concurring). The view espoused by Petitioner would undermine the firmly established principle that the fundamental Seventh Amendment right to a jury trial cannot be lost simply by the fact that legal and equitable claims arise out of the same facts or that a legal claim might be characterized as "incidental" to equitable relief. *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470 (1962).[4]

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3. In the instant case the issue of instatement has become moot. Crocker is now 70 years old and suffers from an incapacitating illness.

4. In *Woodell v. International Bhd. of Elec. Workers*, 502 U.S. 93 (1991), the Court found that the plaintiff was entitled to a jury trial on his backpay claim when coupled with a claim for injunctive relief.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

To attempt to show a conflict Piedmont relies primarily upon two cases: *Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir. 1995), and *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994). Pet. at 18-20. Neither case involves the Airline Deregulation Act. *Schwartz* is not a Seventh Amendment case. It involved a claim for breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA) a statute which provides only for equitable relief. The Sixth Circuit found, relying on *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), that the ERISA legislation provides the trial judge with discretion to award backpay as a form of restitution. *Schwartz v. Gregori*, 45 F.3d at 1022. This case is not in conflict with the D.C. Circuit's ruling. Rather *Schwartz* supports the statutory specific approach taken by the D.C. Circuit in the instant case.

Pandazides involved a claim against a third party under Section 504 of the Rehabilitation Act. In finding a right to a jury, the Fourth Circuit in *dicta* hypothesized that a suit against the employer possibly "could be characterized as restitutionary" but specifically declined to rule on the issue. 13 F.2d at 832. *See Waldrop v. Southern Co. Servs. Inc.*, 27 F.3d 152 (11th Cir. 1994), confirming a right to a jury on backpay claim when joined with claims for injunctive relief against an employer in a Section 504 action.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID M. KIRSTEIN
Counsel of Record
ROBERT M. BECKMAN
BECKMAN & KIRSTEIN
Attorneys for Respondent
2300 N Street, N.W.
Suite 725
Washington, D.C. 20037
(202) 835-3200